Supreme Court, U.S.
FILED

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

EMMA MAE MCDONNELL,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER POSTAL WORKERS CAN PURSUE A STATE LAW TORT CLAIM FOR DISCRIMINATION OR RETALIATION FOR FILING ON AN ON-THE-JOB OR JOB-RELATED INJURY BY BRINGING THE CLAIM UNDER THE FEDERAL TORT CLAIMS ACT.

II. WHETHER POSTAL WORKERS CAN PURSUE A CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS UNDER THE FEDERAL TORT CLAIMS ACT.

PARTIES TO THE PROCEEDING

The parties to this proceeding all appear in the caption.

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II. The issue to be decided in this case - whether the United States Postal Service's actions make out the elements of discrimination or retaliation or intentional infliction of emotional distress under Texas law - is a "purely factual question".

III. The Postal Reorganization Act, just as the Railway Labor Act (RLA) in *Hawaiian, supra*, does not preempt the substantive protections

extended by the states independent of any negotiated collective bargaining agreement.

IV. The postal worker's wrongful discrimination or retaliation or intentional emotional distress claims under state law were independent of the collective bargaining agreement between the United States Postal Service and the Postal Workers.

V. The collective bargaining agreement is not the only source of a postal worker's right not to be wrongfully discriminated or retaliated against or intentionally inflicted with emotional distress.

VI. The Postal Reorganization Act does not address the question of discrimination because of an on the job injury and this omission is properly dealt with under state law.

VII. The parties obligation under the Postal Reorganization Act to arbitrate disputes arising out of the collective bargaining agreement did not relieve the United States Postal Service of the state law obligations not to wrongfully discriminate or

retaliate against postal workers or intentionally inflict emotional distress upon them.

VIII. The Federal Employees Compensation Act does not provide postal workers with a remedy for the wrongs addressed in Petitioner's complaint.

IX. The Federal Tort Claims Act is an excellent legal vehicle by which the state law anti-discrimination tort statute prohibiting retaliation against a worker for pursuing an on the job injury and the state action for intentional infliction of emotional distress can be addressed by the federal courts.

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ON PETITION FOR A WRIT OF CERTIORARI TO
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FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI

Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States court of Appeals for the Fifth Circuit entered in this action on January 23, 1996.

OPINIONS BELOW

The decision of the district court is not reported. The decision of the Court of Appeals was not published per local rule 47.5. Both decision are contained in the attached Appendix.

BASIS FOR JURISDICTION

The final judgment of the Court of Appeals was entered on January 23, 1996. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. Section 1254 (1).

STATUTORY PROVISIONS INVOLVED

Federal statutes:

Civil Service Reform Act, 5 U.S.C.S. Section 1101 note, 1201 *et seq.*

Federal Employees' Compensation Act, 5 U.S.C.S. Sections 7902, 8101 *et seq.*, 8144 *et seq.*

Federal Tort Claims Act 28 U.S.C.S. Sections 2671 *et seq.*

Labor Management Relations Act 29 U.S.C.S. Sections 185(a) , and 301(a)

Postal Reorganization Act 39 U.S.C.S. Sections 1001 -1011 and 1201 - 1209

Railway Labor Act 45 U.S.C.S. Sections 151 *et seq.*

Texas Statutes:

Texas Labor Code Sec. 451 *et seq.*

STATEMENT OF THE CASE

(i) STATEMENT OF FACTS.

For ease of identification the following will be used throughout this Petition:

Petitioner will be called McDonnell.

Respondent will be called USA.

The Federal Tort Claims Act (28 U.S.C. Sec. 2671 *et seq.*) will be called the FTCA.

The facts involve the allegedly outrageous treatment of McDonnell in the context of her employment as a postal worker intended to oppress McDonnell to the point she would quit her job. In addition McDonnell received written communications from the Wichita Falls Postmaster detailing his belief that when he hired her that he had no reason to worry about future job-related claims although the prior postmaster had cautioned him regarding McDonnell. On April 15, l994, McDonnell was separated from the Postal Service. Following the filing of McDonnell's FTCA claim, the letter of separation of McDonnell from her employment with

the United States Postal Service was rescinded.

On August 15, 1995, McDonnell received a letter from the United States Department of Labor disallowing her FECA claim, the same claim which the USA represented to the District Court in its Motion and attachments as being accepted.

Since the position of the USA, the District Court and the Court of Appeals is that no fact situation will permit either cause of action to be brought under the FTCA when the claimant is a postal worker, we have not attempted to elaborate on the facts.

(ii) COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW.

This case was filed on October 14, 1994. All jurisdictional prerequisites for bringing a claim under the Federal Tort Claims Act (28 U.S.C. Sec. 2671 *et seq.*) were complied with and no challenge to the procedural prerequisites was made. Challenges to the basic jurisdiction of the Court to hear this type of claim as a

Federal Tort Claims Act were made.

The USA, Respondent herein, filed its Rule 12(b)(1) and Rule 56 motions entitled Motion by Defendant, United States of America, to Dismiss, or in the Alternative, for Summary Judgment, with Brief.

The Petitioner responded with Plaintiff's Response with Brief to Defendant's Motion to Dismiss, or in the Alternative, for Summary Judgment.

The Court granted Defendant's Motion to Dismiss on May 25, 1995.

Notice of Appeal was timely given on June 22, 1995.

The Fifth Circuit handed down its unpublished opinion on January 23, 1996. No request for rehearing was made.

REASONS FOR GRANTING THE WRIT

I. The rule in *Lingle v. Norge Division, Magic Chef*, 486 US 399 (1988) recently extended to include federally regulated transportation workers in *Hawaiian Airlines, Inc. v. Norris*, 512 US ____ (1994) should be further extended to Postal Workers.

II. The issue to be decided in this case - whether the United States Postal Service's actions make out the elements of discrimination or retaliation or intentional infliction of emotional distress under Texas law - is a "purely factual question".

III. The Postal Reorganization Act, just as the Railway Labor Act (RLA) in *Hawaiian*, *supra*, does not preempt the substantive protections extended by the states independent of any negotiated collective bargaining agreement.

IV. The postal worker's wrongful discrimination or retaliation or intentional emotional distress claims under state law were

independent of the collective bargaining agreement between the United States Postal Service and the Postal Workers.

V. The collective bargaining agreement is not the only source of a postal worker's right not to be wrongfully discriminated or retaliated against or intentionally inflicted with emotional distress.

VI. The Postal Reorganization Act (PRA) does not address the question of discrimination because of an on the job injury and this omission is properly dealt with under state law.

VII. The parties obligation under the Postal Reorganization Act to arbitrate disputes arising out of the collective bargaining agreement did not relieve the United States Postal Service of the state law obligations not to wrongfully discriminate or retaliate against postal workers or intentionally inflict emotional distress upon them.

VIII. The Federal Employees Compensation Act does not provide postal workers with a remedy for the wrongs addressed in Petitioner's complaint.

IX. The Federal Tort Claims Act is an excellent legal vehicle by which the state law anti-discrimination tort statute prohibiting retaliation against a worker for pursuing an on the job injury and the state action for intentional infliction of emotional distress can be addressed by the federal courts.

ARGUMENT AND AUTHORITIES

Specifically, a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

This court has not yet addressed the rights of a postal worker to pursue a state cause of action in the employment context under the FTCA.

The lower courts held that McDonnell's state cause of actions for discrimination and retaliation and intentional infliction of emotional distress are totally pre-empted and not cognizable under the FTCA.

In the *Hawaiian, supra,* decision this court held that

federally regulated transportation workers were not barred by their collective bargaining agreement or the Railway Labor Act (RLA) from pursuing a state law tort claim against their employer.

Postal workers are also a hybrid employee, not truly a full federal employee, and yet the postal service like the transportation industry is regulated by federal law. Here the federal law, which in this case is the Postal Reorganization Act (PRA), is analogous to the Railway Labor Act analyzed in *Hawaiian, supra*, and to the Labor Management Relations Act analyzed in *Lingle, supra*. The affected employees in *Lingle* and *Hawaiian* likewise enjoyed the benefits of being unionized and had collective bargaining agreements.

McDonnell's state causes of action may be decided independently of the collective bargaining agreement between the postal workers union and the United States Postal Service like Lingle and Norris.

There are no significant distinguishing features between the regulated transportation worker and the federal scheme of regulation which regulates the transportation

industry and the regulated postal worker and the federal scheme of regulation which regulates the postal service.

There is no rational basis for denying the postal worker the same rights to redress afforded Lingle and Norris.

The Federal Tort Claims Act can only be pursued in federal court, where there is no right to a jury or to punitive damages. As a result, the federal judiciary would maintain control of the applicable case law and at the same time would provide a remedy to redress postal workers who have been wrongfully discriminated and retaliated against or intentionally inflicted with emotional distress because the postal worker exercised his or her right to pursue a FECA claim for a physical injury. The state law prohibiting discrimination for pursuing a compensation claim can be accommodated as a necessary remedial measure in the employment context as easily as the other types of discrimination that are outlawed and have a remedy provided. There is already in existence an administrative buffer before court action can be brought by the required

filing of the FTCA claim with the proper head of the federal entity against whom the claims lies, in this instance, the United States Postmaster for the postal facility involved or the Post Master General in Washington, D.C. In this manner, just as in other areas involving discrimination, the agency has an opportunity to administratively review, investigate and remedy claims prior to the FTCA claimant being able to file suit.

For these reasons the legal vehicle of using the FTCA as a means to pursue a claim for intentional infliction of emotional distress and/ or a claim for discrimination or retaliation arising from filing an FECA claim for postal workers makes sense and can easily be accommodated under present law. The integrity of federal case law in matters of such as this will be preserved if these claims can be brought under the FTCA.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be **GRANTED**.

Respectfully submitted,

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* Counsel of Record

ATTORNEYS FOR PETITIONER,
EMMA MAE MCDONNELL

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Petition for Certiorari has been sent to Angie L. Henson, Assistant U. S. Attorney, 801 Cherry Street, Suite 1700, Fort Worth, Texas 76102 on this 22nd day of April, 1996.

_____
Holly Crampton

NO._____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

EMMA MAE MCDONNELL,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

EMMA MAE MCDONNELL, Plaintiff,	*	
VS.	*	CIVIL ACTION NO. 7:94-CV-101-X
UNITED STATES OF AMERICA, Defendant	*	

FINAL JUDGMENT

In accordance with the Court's Order Granting Defendant's Motion to Dismiss entered this same day, the Court hereby ORDERS and ADJUDGES that the above-styled and -numbered cause of action should be, and hereby is, DISMISSED and that Plaintiff take nothing.

The Court further ORDERS and ADJUDGES that judgment be entered in favor of Defendant.

The Court further ORDERS and ADJUDGES that costs of court should be, and hereby are, assessed against Plaintiff.

The clerk of Court is instructed to close this case.

IT IS SO ORDERED.

SIGNED this 25th day of May, 1995.

JOE KENDALL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

EMMA MAE MCDONNELL, Plaintiff,	*	
VS.	*	CIVIL ACTION NO. 7:94-CV-101-X
UNITED STATES OF AMERICA, Defendant	*	

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Before the Court is Defendant's Motion to Dismiss, or in the Alternative, for Summary Judgment, which was filed on February 2, 1995. After due consideration, the Court is of the opinion that said motion should be, and hereby is, **GRANTED** since this action is barred as a matter of law, as explained below and this case is ORDERED CLOSED.

Background

Plaintiff, a former postal employee, brought suit pursuant to 28 U.S.C. Section 2671 et seq. (the "Federal Tort Claims Act" or "FTCA") asserting two state law causes

of action for injuries arising from her federal employment: (1) that Defendant violated the Texas Workers' Compensation Act, Texas Labor code Section 451.001, by harassing[1] her in retalilation for filing a federal workers' compensation claim pursuant to 5 U.S.C. Section 81o1 et seq. (the "Federal Employees Compensation Act" or "FECA") and for her refusal to apply for disability retirement, and (2) that said harassment was an intentional infliction of emotional distress on Plaintiff.

As a former city letter carrier, Plaintiff was represented by the National Association of Letter Carriers, AFL-CIO ALC" OR "Union"). Article 15, Section 1 of the 1990-1994 collective bargaining agreement ("CBA") between the U.S. Postal Service ("USPS") and the NALC, which was in effect at all times relevant to this lawsuit, provided that Plaintiff and other members of her collective bargaining unit could grieve "a dispute, difference, disagreement or complaint between the parties related to

wages, hours, and **conditions of employment**" (emphasis added). The CBA further provided that:

> A grievance shall include, but is not limited to, the complaint of an employee or of the Union which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

Through her union, Plaintiff, on July 22, 1992, filed a FECA claim with the Department of Labor ("DOL") for job-related injuries/illnesses to her neck and shoulders which she sustained in th course and scope of her employment. Over a year and a half later, on April 15, 1994, the Postmaster issued a Notice of Separation - Disability. On July 21, 1994, the DOL granted Plaintiff's FECA claim for her shoulder and neck injuries and has, to date, paid her at least $17,000 in benefits on that claim. On August 1, 1994, the Postmaster rescinded the April 15, 1994, Notice of Separation -Disability since Plaintiff's separation had, at that time, not become effective.

Also through her union, Plaintiff filed four CBA grievances including: (1) a May 5, 1994 grievance contesting her separation for disability which was denied following arbitration on December 16, 1994; (2) an August 8, 1994 grievance complaining about a change on a personnel action form (Form 50) pertaining to Plaintiff which was resolved; (3) an August 25, 1994 grievance regarding Plaintiff's personnel file which was resolved; and (4) anAugust 30, 1994 grievance regarding Plaintiff's personnel records which was resolved.

Subsequntly, on June 17, 1994, Plaintiff filed an administrative claim pursuant to the FTCA demanding over $17.5 million in damages. It was denied on August 12, 1994 and this suit, which is based only upon the FTCA, was filed October 14, 1994.

Discussion

The D.C. Circuit in American Postal Workers Union, AFL-CIO v. United States Postal Service, 940 F. 2d 704 (1991), provided an excellent overview of the relationship of

the various statutes that govern Postal Service employment relationships when it stated as follows:

> Chapters 10 and 12 of the Postal Reorganization Act ("PRA"), 39 U.S.C. Sections 1001-1011, 1201-1209, set out a comprehensive scheme governing employee relations within the Postal Service. The PRA operates largely by incorporating other statutes, including the FECA, see 39 U.S.C. Section 1005 (c), and part of the CSRA [Civil Service Reform Act of 1978]. This scheme for review of adverse employment decisions is the type of "narrowly tailored employee compensation scheme" that the Supreme Court has held "pre-empts the more general tort recovery statutes." See Brown v. General Services Administration, 425 U.S. 820, 834-835.[2] Remedial statutes aimed at specific harms, like the Rehabilitation Act of 1973 and Title VII of the Civil Rights Act of 1964, by their terms supplement the PRA. [Citations omitted] A residual statute like the FTCA, however, cannot coexist with a comprehensive employment relations scheme. The PRA incorporates portions of the CSRA, an "elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations," Bush v. Lucas, 462 U.S. 367, 388 (1983) (CSRA preempts Bivens action for retaliatory demotion), and we have no warrant to permit the appellants to use the FTCA as a means of circumventing it.

American Postal Workers Union also acknowledges that where collective bargaining grievance procedures are available, as they were in this case, they are the exclusive

remedy for non-injury/illness claims and resort to state tort law is precluded for that additional reason. See also Scott v. machinist Automotive Trades D. Lodge, 827 F.2d 589 (9th Dir, 1987); Roman v. United States Postal Service, 821 F. 2d 3282 (7th Cir. 1987); McCollum v. Bolger, 794 F.2d 602 (11th Cir. 1986); Ellis v. United States Postal Service, 784 F.2d 835 (7th Cir. 1986).

* * *

The FTCA expressly disallows federal employees from seeking redress against the Postal Service under the FTCA. It provides in pertinent part as follows:

> The provisions of this chapter and section 1346 (b) of this title shall not apply to:
>
> (a) Any claim based upon an act or omission of an employee a statute or regulation, whether or not such statute or regulation be valid, **or based upon the exercise or performance or the failure to exercise or perform a discretionary function on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.**

28 U.S.C. Section 1680 (emphasis added). Obviously, decisions relating to the administration of federal personnel

policy, such as those at issue in this case, are inherently discretionary.

The Fifth Circuit addressed the issue presented here in Morales v. Dept. of the Army, 947 F.2d 766 (5th Cir. 1991). In Morales, a federal employee filed an administrative tort claim demanding damages for intentional infliction of emotional distress, inter alia. Id. At 768. The gravamen of his claim was that his supervisors, acting deliberately and within the course and scope of their employment, had wrongfully listed him AWOL, had stopped his pay without notice, and had intimidated him at this place of business. Id. At 768. The Fifth Circuit in Morales held that all of the plaintiff federal employee's claims stemmed from the federal employment relationship, and as such, were barred by the CSRA. The Morales court explained: "In Bush v. Lucas, 462 U.,S. 367 (1983), the Supreme court held that the CSRA was the exclusive remedy for a federal employee who alleged that a demotion was retaliatory . . . We extend Bush's preclusive effect in Rollins v. Marsh, 937

F.2d 134 (5th Cir. 1991), to include . . . FTCA claims and state-law claims." Id. At 768.

The FTCA precludes federal employees from bringing claims against the government when the claims 'arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States." Bush v. Lucas, 462 U.S. 367 (1983). Because Plaintiff was a federal employee whose tort claims stem from her employment with the Postal Service, Plaintiff is similarly situated to the plaintiffs in Morales and Rollins. Plaintiff's status, therefore, prevents her from maintaining an action against the postal service defendant under the FTCA for employment-related claims because her remedy lies instead within the comprehensive remedial scheme set forth in the CSRA and/or her CBA. Accordingly, both of Plaintiff's FTCA claims are subject to dismissal pursuant to the express terms of the FTCA.3

compensation program for Government employees. This federal workers' compensation program was intended not as a supplement to, but rather as a substitute for a tort suit. Bailey v. United States, 451 F. 2d 963, 965 (5th Cir. 1971) (FECA is a federal workers' compensation statute that provides an injured federal employee with a substitute method of recovery, which is more efficient and less expensive than a state law tort claim.) The Fifth Circuit in Gill v. United States, 641 F.2d 195, 197 (5th Cir. 1981), explained that, "[t]he heart of the [FECA workers' compensation] system is an implicit bargain: employees are granted surer and more immediate relief in return for foregoing more expensive rewards outside the system."

The Secretary of the DOL is vested with the power to administer and to decide all questions arising under the FECA, and his/her action in denying or granting compensation is final and conclusive and may not be reviewed by a court of law. 5 U.S.C. 8128 (b)(1) & (2), 8145. IF there is a substantial question as to whether a

plaintiff's injuries are covered by the FECA, the employee may not pursue a tort claim in an action under the FTCA until after she has sought and been denied relief under the FECA by the Secretary of the DOL. Bailey v. United States, 451 F.2d at965; Avasthi v. United States, 608 F.2d 1059, 1060 (5th Cir. 1979).

FECA expressly states that it is the exclusive remedy for all injuries falling within its coverage and it precludes federal employees from bringing suit under a different statutory scheme, such as the FTCA. 5 U.S.C. Section 8116 (c) [5]; Benton v. United States, 960 F.2d 19 (5th Cir. 1992). The Secretary's decision is final and binding upon Plaintiff for all of her injuries, even those injuries for which she did not receive any compensation, and this action is barred as a matter of law. 5 U.S.C. Section 8128(a). Here, Plaintiff is not entitled to redress even under the FECA for her intentional infliction of emotional distress claim since she has not demonstrated that the Secretary denied her relief under FECA for that claim, i.e.,

that she exhausted her FECA remedies. Burke v. United States, 644 F.Supp. 566, 568 (E.D. La. 1986); Bailey v. United States, 451 F.2d 963 (5th Cir. 1971); Grijalva v. United States, 781 F.2d 472 (5th Cir. 1986), cert denied, 107 S. Ct. 89; Burke v. United States, 644 F.Supp. At 568.

Accordingly, since Plaintiff cannot utilize the remedies available under the FTCA for her intentional infliction of emotional distress claim, the Court **ORDERS** that Defendant's Motion to Dismiss pursuant to Fed.R. Civ.P. 12(b)(1) is **GRANTED**.

IT IS SO ORDERED.

SIGNED this 25th day of May, 1995.

JOE KENDALL
UNITED STATES DISTRICT JUDGE

[1] Plaintiff maintains that postal officials harassed her by refusing to accommodate her physical limitations and through various personnel actions.

[2] See also Rollins v. Marsh, 937 F.2d 134, 139 (5th Cir. 1991).

[3] Plaintiff's response to the motion at bar cites Truman v. United States, 26 F.3d 592 (5th Cir. 1994) for the proposition that intentional infliction of emotional distress claims are cognizable under the FTCA. However, Truman and this case are different in at least one significant respect: Truman involved an employee of Oscar Mayer, a private business enterprise, and this case involves a federal civil service employee. Accordingly, the FECA and CSRA did not apply to Ms. Truman since she was not a federal civil service employee and, thus, the FECA and SCRA did not preempt her tort claims under the FTCA. The court does not reach the analysis of whether Plaintiff's claims "arose out of" the tortious conduct specified in 28 U.S.C. Section 2680(h), the listed exceptions to the FTCA's general consent-to-be-sued policy, since the FTCA's remedies are not available to Plaintiff.

[4] FECA defines the term "injury" as including "in addition to injury by accident, a disease proximately cause by the employment." 5 U.S.C. Section 8101(5). See also Lewis v. Cisneros, 1995 WL 33662, 2 (E.D. La); Heilman v. United States, 731 F.2d 1104, 1111 n.6 (3rd Cir. 1984) (holding that FECA covers claims for intentional torts); Burke v. United States, 644 F.Supp. 566 (E.D. la. 1986) (holding that FECA covers claims for intentional infliction of emotional distress); Swafford v. United States, 998 F.2d 837 910th Cir. 1993); McDaniel v. United States, 970 F. 2d 194 (6th Cir. 1992); Castro v. United States, 757 F. Supp. 1149 (W.D. Wash. 1991); Williams v. United States, 565 F. Supp. 59 (N.D. Miss. 1983).

[5] FECA states in part that, "The liability of the United States . . . with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States . . . to the employee . . . because of the injury or death in a direct judicial proceeding, in a civil action, or . . . under a Federal tort liability suit." 5 U.S.C. Section 8116

c . In other words, any personal injury claims arising form federal employment are precluded by FECA, and other claims arising from Federal employment may not be asserted on any other basis.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 95-10572

Summary Calendar

EMMA MAE MCDONNELL,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the

Northern District of Texas

(7:94-CV-101)

Before GARWOOD, JOLLY AND PARKER, Circuit Judges.
*

PER CURIAM:

This is an appeal from the dismissal of appellant's claims brought under the Federal Tort Claims Act (FTCA). She argues that, after she filed her workers' compensation claim for employment-related physical injury pursuant to the Federal Employees' Compensation Act (FECA), she was on that account subjected to retaliatory employment discrimination and discharge and to intentional infliction of emotional distress, during her employment and in relation to her discharge, by the Postal Service, her former employer. She argues that the district erred in determining that FECA'S exclusive remedy provision barred her claims under the FTCA. We have reviewed the record and find no reversible error. We agree, generally for the reasons given in this respect by the district court, that appellant's FTCA claims are precluded by the FECA and the Civil Service Reform Act (CSRA) as made applicable to Postal Service employment by the Postal Reorganization Act. *See Benton*

v. United States, 960 F. 2d 19, 21 9 5th Cir. 1992); *Morales v. Dept. of the Army*, 947 F.2d 766, 768-69 (5th Cir. 1991). See also *Pereira v. United States Postal Service*, 964 F.2d 873, 875 (9th cir. 1992); *Saul v. United States*, 928 F.2d 829 (9th Cir. 1991). We note that *Lingle v. Norge Div. Of Magic Chef, Inc.*, 486 U.S. 399 (1988), relied on by appellant, deals with wholly private employment and does not involve the FTCA, the FECA, or the CSRA. Similarly, in *Truman v. United States*, 26 F.3d 592 (5th Cir. 1994), also relied on by appellant, the plaintiff was not a federal employee, and the FECA and the CSRA were not involved. Postal Service employees are federal employees and a part of the civil service. 39 U.S.C. Section 1001 (b). We do not reach the discretionary function issue.

AFFIRMED

* Pursuant to Local rule 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

Supreme Court, U.S.
FILED
JUL 8 1996
CLERK

No. 95-1819

In the Supreme Court of the United States

OCTOBER TERM, 1995

EMMA MAE MCDONNELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
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QUESTION PRESENTED

Whether a Postal Service employee is entitled to maintain a suit under the Federal Tort Claims Act based on actions that arose out of her employment.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1819

EMMA MAE MCDONNELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. [C][1]) is unpublished, but the decision is noted at 78 F.3d 581. The opinion of the district court (Pet. App. [B]) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1996. The petition for a writ of certiorari

[1] The appendix to the petition has no page numbering. We have designated the final judgment as App. A, the district court's decision as App. B, and the decision of the court of appeals as App. C. We have also designated page numbers, which appear in this brief inside brackets.

was filed on April 22, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In July, 1992, petitioner, a Postal Service employee, filed a claim with the Secretary of Labor under the Federal Employee Compensation Act (FECA) for injuries to her neck and shoulders, which she sustained in the course of employment. Pet. App. [B3]. Her complaint alleges that, after she filed her FECA claim, she was sometimes not given accommodation for her injury-related limitations and was essentially "locked out" of the acting supervisor program. Compl. ¶¶ 37, 79.

On April 15, 1994, the Postmaster issued petitioner a Notice of Separation-Disability, but the notice was rescinded on August 1, 1994, after petitioner's FECA claim was granted and before the separation became effective. Pet. App. [B3]. While the notice of separation was pending, petitioner filed a union grievance on May 5, 1994, contesting the proposed separation for disability. *Id.* at [B4]. The grievance was denied by an arbitrator. *Ibid.*

While the notice of separation and the related grievance were pending, petitioner filed an administrative claim under the Federal Tort Claims Act (FTCA) on June 17, 1994, seeking $17.5 million in damages. The Postal Service denied the claim on August 12, 1994. Pet. App. [B4].

On October 14, 1994, petitioner commenced this FTCA action in district court, alleging two claims under state law: that the Postal Service harassed her in retaliation for pursuing a claim for a work-related injury (her FECA claim), and that this harassment

amounted to the intentional infliction of emotional distress. Pet. App. [B2].

2. The district court dismissed petitioner's claims, concluding that they were barred (i) because they came within the "discretionary function" exception to the FTCA, Pet. App. [B6-B7], and (ii) because petitioner's "remedy lies instead within the comprehensive remedial scheme set forth in the CSRA and/or her [collective bargaining agreement]," *id.* at [B8]. The court also held that the emotional distress claim was barred by FECA "to the extent it is a work-related 'injury.'" Slip op. at 7.[2] FECA is a "substitute for a tort suit," not a supplement, Pet. App. [B9], and it precludes an action by a federal employee under the FTCA, *id.* at [B10].

3. The court of appeals affirmed. It held, "generally for the reasons given * * * by the district court," that petitioner's FTCA claims were "precluded by the FECA and the Civil Service Reform Act (CSRA) as made applicable to Postal Service employment by the Postal Reorganization Act." Pet. App. [C2]. The court noted that Postal Service employees are federal employees and part of the civil service. It distinguished *Lingle* v. *Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), a non-preemption case, as dealing with "wholly private employment" and "not involv[ing] the FTCA, the

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[2] The quoted language appears in a portion of the decision that is omitted from the appendix. The omitted portion, which should appear after the end of page [B8], reads as follows: "In addition, Plaintiff's FTCA claim for intentional infliction of emotional distress is also subject to dismissal pursuant to the express terms of the FECA to the extent it is a work-related 'injury.'[1] FECA establishes a workers'". The text would continue at the top of page [B9].

FECA, or the CSRA." Pet. App. [C3]. The court declined to reach the discretionary function issue. *Ibid.*

ARGUMENT

1. In *United States* v. *Fausto*, 484 U.S. 439 (1988), this Court held that the CSRA is the exclusive remedy for federal employees who wish to challenge adverse personnel actions and that such employees are barred from pursuing another remedy even if the CSRA provides them with no remedy at all. The CSRA "'comprehensively overhauled the civil service system,' creating an elaborate 'new framework for evaluating adverse personnel actions against [federal employees].'" *Id.* at 443 (citation omitted) (quoting *Lindahl* v. *OPM*, 470 U.S. 768, 773, 774 (1985)). "It prescribes in great detail the protections and remedies applicable to such action, including the availability of administrative and judicial review." *Fausto*, 484 U.S. at 443. As this Court has recognized, "[a] leading purpose of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action" with "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Id.* at 444, 445.

The courts of appeals have uniformly held that a federal employee governed by the CSRA may not pursue an employment-related claim under the Federal Tort Claims Act (FTCA). See, *e.g.*, *Steele* v. *United States*, 19 F.3d 531, 532 (10th Cir. 1994); *Gergick* v. *Austin*, 997 F.2d 1237, 1239 (8th Cir. 1993), cert. denied, 114 S. Ct. 1536 (1994); *Morales* v. *Dep't of the*

Army, 947 F.2d 766, 768 (5th Cir. 1991); *Rollins* v. *Marsh*, 937 F.2d 134, 139-140 (5th Cir. 1991); *Rivera* v. *United States*, 924 F.2d 948, 951-952 (9th Cir. 1991); *Premachandra* v. *United States*, 739 F.2d 392, 394 (8th Cir. 1984) (pre-*Fausto* decision) ("in enacting the civil service laws, Congress addressed the problem of wrongful termination decisions, and determined which consequential harms ought to be recompensed").[3]

The Postal Reorganization Act, 39 U.S.C. 1001-1011, 1201-1209, incorporates parts of the CSRA, as well as the FECA. See 39 U.S.C. 1005. Accordingly, the same rules barring FTCA actions by federal employees have been held to apply to Postal Service employees whose employment rights are spelled out in a collective bargaining agreement under Sections 1201-1209. See *American Postal Workers Union* v. *United States Postal Service*, 940 F.2d 704, 708-709 (D.C. Cir. 1991). The FTCA "cannot co-exist with a comprehensive employment relations scheme" such as the Postal Reorganization Act. *Id.* at 708. See *McCollum* v. *Bolger*, 794 F.2d 602, 607 (11th Cir. 1986), cert. denied, 479 U.S. 1034 (1987) (Postal Service employees are "governed by a comprehensive procedural and substantive system that provides an adequate remedy"); see also *Yokum* v. *United States Postal Service*, 877 F.2d 276, 278 (4th Cir. 1989) ("nonpreference eligible Postal Service employees have neither a statutory nor nonstatutory right to judicial review of adverse personnel actions"). Here, petitioner availed herself of the remedies she had under the collective bargaining agreement, Pet. App. [B4], and she

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[3] The Sixth Circuit has reserved the question. *McDaniel* v. *United States*, 970 F.2d 194, 198 (6th Cir. 1992) (per curiam).

was barred from bringing an FTCA claim arising out of her employment relationship with the Postal Service.[4]

2. Petitioner's principal argument is that, rather than applying the rules barring federal employees from suing under the FTCA, the Court should extend the private-sector non-preemption rules of *Lingle* v. *Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), and *Hawaiian Airlines, Inc.* v. *Norris*, 114 S. Ct. 2239 (1994), to Postal Service employees. Pet. 8. That argument is without merit.

Petitioner's argument turns upon her description of the Postal Service employee as a "hybrid" and "not truly a full federal employee." Pet. 11. This characterization conflicts with the plain language of the statutes that govern the Postal Service and its employees. See 39 U.S.C. 201 (the Postal Service is "an independent establishment of the executive branch of the Government of the United States"); 39 U.S.C. 1001(b) ("Officers and employees of the Postal Service (other than those individuals appointed under sections 202, 204, and 1001(c) of this title) shall be in the postal career service, which shall be a part of the civil service."). Unlike the private-sector employees in *Hawaiian Airlines* and *Lingle*, Postal Service employees work for the federal government. Those

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[4] To the extent petitioner seeks compensation for physical and emotional injuries from on-the-job harassment covered by FECA, she is also barred from bringing an FTCA action because FECA expressly bars such a suit, as the court of appeals correctly held. Pet. App. [C2]. See 39 U.S.C. 1005(c) (incorporating FECA for Postal Service officers and employees); 5 U.S.C. 8116(c) (provision of FECA prohibiting suits against the United States or instrumentality brought "under a Federal tort liability statute").

cases, therefore, do not apply in—and should not be extended to—this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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